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No. _____

The Supreme Court of the United States

OCTOBER TERM, 1993

JEROME BERG,

Petitioner

VS.

THE DOCTORS' INSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did retroactive application of California Civil Code Section 2860 by the California state courts unconstitutionally alter obligations of contract in violation of the Contracts Clause of the United States Constitution Article I, Section 10 by ending the insurance company's duty to provide independent counsel midway through litigation in which the insureds were represented by conflicted insurance company selected attorneys?

2. Was Petitioner denied due process of the law under the Fourteenth Amendment to the United States Constitution because the lower courts refused to allow introduction of Petitioner's relevant evidence: (a) demonstrating conflicts of interest by the insurance company's selected attorneys, and (b) demonstrating work Petitioner

accomplished as counsel for the insureds where the court of appeal faulted Petitioner for not introducing adequate proof that the insurance company selected attorneys were in conflict with the insureds they were defending.

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OPINIONS BELOW

The opinion of the California Court of Appeal has not been published in official reports. A copy of this unpublished opinion is set out hereinafter as Exhibit 1 in Appendix B. The Judgment on Verdict from the California Superior Court, County of San Francisco is attached as Exhibit 2 in Appendix B. The Order Granting Summary Adjudication of Issues is attached as Exhibit 3 in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal was entered on July 30,1993. A timely Petition for Rehearing in the California Court of Appeal was denied on August 23, 1993. (Exhibit 4 in Appendix B) A timely petition for hearing before the California Supreme Court was denied on November 23, 1993. (Exhibit 5 in Appendix B) The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Contracts Clause, Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States, printed as Exhibit 1 in Appendix A. The statutory provision involved is California Civil Code § 2860, printed as Exhibit 2 in Appendix A.

STATEMENT OF THE CASE

Prior to enactment of Civil Code § 2860 petitioner had been "independent counsel" of record in over 40 active malpractice lawsuits representing dentists insured by The Dentists Insurance Company (TDIC) due to conflicts of interests of TDIC and

their usual (panel) counsel[1] who regularly defend TDIC insureds. TDIC acknowledged petitioner's representation in writing and paid his fees for well over one year.

In September, 1987, the California Legislature passed Civil Code § 2860, which became effective on January 1, 1988. Section 2860 partially codified and partially modified the decision in *San Diego Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358, 364 [208 Cal.Rptr. 494].[2] The pertinent parts of §2860 declare that:

> when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy

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1 Bradley and Curley, hereinafter "B&C."

2 Hereinafter *Cumis*.

limits.[3]

TDIC viewed enactment of Civil Code § 2860 as an excuse to stop paying for independent counsel. Ignoring the myriad conflicts, TDIC took the position that the only reason it had supplied *Cumis* counsel was that the complaints included claims for punitive damages. Since § 2860 states that claims for punitive damages do not, in and of themselves, trigger *Cumis* obligations, TDIC argued it no longer had to pay Berg. In January and February, 1988, TDIC notified Petitioner, Dr. P, Dr. W and Dr. M (the insureds) that it would no longer pay for Berg's services in those ongoing lawsuits against these dentists.

When Petitioner learned of Respondent's decision, he immediately wrote Respondent and pointed out the error in its position (C.T. 834 to 837)[4]. Respondent persisted.

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[3] California Civil Code Section 2860(b), West's Annotated California Codes, 1993.

[4] C.T. refers to the Clerk's Transcript.

Petitioner's clients' backs were against the wall. Although Respondent stopped paying for Petitioner's services, and he did not get paid by anyone else, Petitioner continued to represent Dr. W, Dr. P and Dr. M. in those lawsuits pursuant to his ethical obligations. In the cases of Dr. P and Dr. W he continued to work for two and one half years until all the malpractice cases against them were resolved. (C.T. 701 to 711)

Respondent was aware that Petitioner had not stopped working on those lawsuits. In fact, after refusing to pay Petitioner for work he was doing after the start of 1988, Respondent cynically advised the dentists to consult with Petitioner when questions involving conflicts arose. (C.T. 849, 871 to 873, 874, 878, 884, 1068, 1074, 1078-1079, 1101 to 1102) In the case of Dr. W, after the 1988 cutoff,

Petitioner negotiated a binding arbitration of claims for "re-treatment" of most of his patients which were made by the dentists who purchased Dr. W's practice. These were malpractice claims payable under Dr. W's TDIC policy. Respondent was a party to that agreement, and Respondent paid the arbitrator. (C.T. 841, 850 to 852, 853 to 856)

A. Summary Adjudication

Early in this case, a motion for summary adjudication of issues was granted at C.T. 323, lines 9 to 22:

> TDIC had no obligation following enactment of Civil Code Section 2860 to pay Jerome Berg's statements for services allegedly performed and costs allegedly incurred as independent counsel for TDIC's insureds (Dr. P., Dr. W., and Dr. M.) in cases *where TDIC reserved its rights solely* because of allegations of punitive damages. (Emph. added.)

Copies of the complaints against Petitioner's clients (including demurrer-tested pleadings charging "intentional

acts") that had been produced on discovery out of Respondent's files (C.T. 485:21-486:2) were presented on a motion for reconsideration (that was not successful).

The trial judge erroneously applied the summary adjudication ruling:

> THE COURT: We know that the law changed January 1st of '88. Leaving them no longer responsible for this.
>
> Why are we pursuing it? You know it and because I know it, because we have a ruling on it.[5] (R.T. 288:8-15, 16-20)[6]

B. No Insurance Coverage for Willful Torts

All of the 40 lawsuits were dangerous to Petitioner's clients who were charged with intentional acts which are excluded from insurance coverage by Insurance Code §§ 253 and 533.[7] The charges are

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5 The trial court is referring to the ruling on summary adjudication.

6 R.T. refers to the Trial Court Reporter's Transcript.

7 Insurance Code § 253 embracing Code of

extensive:

1. The Cases against Dr. W (Unlicensed Dentistry)

Dr. W was a defendant in 20 lawsuits filed in 1985 and 1986. Eighteen of these were filed by Attorney Steven Cavalli. The suits charged Dr. W with permitting unlicensed employees to practice dentistry. (*See* C.T. 503 Berg's testimony at R.T. 884 and attorney Goldman's testimony at R.T. 809.) In some cases Dr. W was also charged with doctoring charts to conceal his tortious acts. (C.T. 503, 735, 757, 811, 820, 823, 830, 871)

Civil Procedure § 1029.8 forbids insurance coverage for health care services rendered by unlicensed people.

Insurance Code § 533 provides that the insurer is not liable for a loss caused by the willful act of the insured.

2. The Cases Against Dr. P (A "meat factory...assembly line")

Dr. P was sued in twenty-two lawsuits. (C.T. 1054). Attorney David Rosenberg represented the plaintiffs in nineteen of the cases. (R.T. 457:13-22). Rosenberg's standard complaint was in evidence at the Motion for Reconsideration of the Summary Adjudication. (C.T. 511) Rosenberg's clients charged Dr. P with running a "meat factory" to maximize his profits. (C.T. 1044). They accused Dr. P of deliberately doing hasty, slipshod dental work with knowledge that a certain percentage would have to be redone. According to the "meat factory" theory, Dr. P had consulted experts who calculated that it was more profitable to redo the work in those cases where he got caught than to slow down the "assembly line," and do the work properly in the first instance. He was also charged

with destroying x-rays, altering charts and doing dental work while intoxicated. (*See* C.T. 511, which supports the Motion for Reconsideration of the Summary Adjudication and C.T. 914, 915, 939, 941, 971, 1013, 1044, 1046, 1063, 1069, 1070, 1072, 1076, 1079, and 1093 - 1098, which support the motion for new trial.) Demurrers to the intentional conduct allegations in "all sixteen" of Rosenberg's then outstanding cases were overruled, and TDIC was so informed by B&C March 4, 1987 (C.T. 954).

3. The Cases Against Dr. M (Unlicensed Surgery)

Dr. M was a defendant in two suits. In Carlile v. M. served in September 1986, (C.T. 1123) he is a dentist who was charged with performing surgery on a patient's body far from the mouth without a physician's license.[8] (*See* Berg's

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8 Another Insurance Code § 253 problem.

testimony at R.T. 1039:21-27; R.T. 1042:27 to 1043:1; C.T. 1123 and 1143), and Mr. Curley's similar testimony at R.T. 489:18-22) In the other case (Oliva v. M) he was charged with fraudulently representing himself as an M.D. in order to obtain her consent for his work on her which resulted in injury. (C.T. 1119-23, 1132)

C. The Original Lawyers Were in Conflict

Over the years, B&C received a great volume of defense cases by assignment from TDIC. (R.T. 437 lines 25 to 28, R.T. 460 lines 21 to 27 and R.T. 461 line 27 to R.T. 462 line 6). B&C began the defenses of Drs. W, P and M. Respondent became "independent counsel" when B&C realized that conflicts of interest plagued their relationship with Drs. W, P and M. (*See* C.T. 716 through 719, 770, 771, 982, 983 and 1134.) As synopsized above it is

obvious that the forty or more lawsuits against these TDIC insureds were all of a type in which the defense lawyers could "tip" the facts to produce outcomes of intentional tort for which TDIC would be forbidden to pay indemnity under public policies expressed in Insurance Code §§ 253 and 533.[9]

Discovery of B&C's secret reports to TDIC revealed that B&C were supplying TDIC heavy evidence of willful torts by the TDIC insureds--items that "coverage counsel" Bronson, Bronson & McKinnon had been consulted about (C.T. 762). These secret reports were cited to the Court of Appeal (which down-played the reports because they were not "direct evidence," Opinion page 9).

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9 *See Supra* note 7.

D. Federal Questions Raised in State Courts

1. §2860 and the Contracts Clause

Petitioner in his Memorandum of Points and Authorities in Support of His Motion For New Trial, or In the Alternative, For Judgement N.O.V. (C.T. 1183; *See* Exhibit 1, Appendix C) raised a constitutional question regarding the Contracts Clause of the United States Constitution and its applicability to California Civil Code Section 2860 as applied in this case.

Petitioner raised the Contract Clause issue in his Opening Brief to the California Court of Appeal, First Appellate District, Division Five at p. 17 (*See* Exhibit 2, Appendix C).

Petitioner also raised the Contract Clause issue in his Petition to the California Court of Appeal for Rehearing at p. 16 (*See* Exhibit 3, Appendix C).

Finally, Petitioner, in his Memorandum of Points and Authorities in Opposition to TDIC's Motion for Summary Adjudication of Issues raises the issues of retroactive application of §2860 and breach of contract contrary to the Contracts Clause. (C.T. 187; *See* Exhibit 4, Appendix C)

2. Due Process Fairness Issues

Petitioner in his Memorandum of Points and Authorities in Support of His Motion For New Trial, or In the Alternative, For Judgement N.O.V. raised fairness concerns regarding evidence deemed inadmissible for trial purposes. (C.T. 1169, 1190; Exhibit 1, Appendix C)

Petitioner also raised the fairness/due process issue in his Opening Brief to the California Court of Appeal, First Appellate District, Division Five at p. 26 (Exhibit 2, Appendix C), and in his Petition to the California Supreme Court

at pages 8-13 (*See* Exhibit 5, Appendix C).

Finally, Petitioner raised the fairness/due process issue in his Petition to the California Court of Appeal for a Rehearing at p. 17 (*See* Exhibit 3, Appendix C)

ARGUMENTS FOR GRANTING CERTIORARI

1. Retroactive application of California Civil Code § 2860 by the California state trial and appellate courts unconstitutionally altered obligations of contract in violation of the Contracts Clause of the United States Constitution Article I, Section 10 and forced attorneys to work in conflict situations.

Article I, Section 10, Clause 1 of the United States Constitution provides that "[no] State shall ... pass any ... Law

impairing the Obligation of Contracts...." In a series of opinions the Court has delineated the reach of the Clause and set forth a three-part inquiry to guide in its interpretation. Parties seeking relief must demonstrate: (1) that there has been a substantial impairment of a contractual relationship; (2) that the impairment is not justified by a "significant and legitimate public purpose," or if so justified, then (3) that the impairment is not based upon reasonable conditions or of a character appropriate to the public purpose justifying the legislation's adoption. *United States Trust Co. v New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 1518 (1977); *Ross v. City of Berkeley,* 655 F.Supp. 820, 827 (N.D.Cal. 1987).

For over a year before enactment of Section 2860, TDIC had been providing representation through independent legal

counsel of record to TDIC insureds involved in tort litigation which charged intentional acts serious enough to be outside their coverage. Petitioner was independent counsel of record in 40 separate law suits. Contract rights between the parties involved had matured prior to enactment of Section 2860. Valid contracts existed under which TDIC owed the insureds a duty to defend those suits. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984).

Petitioner had a contract with TDIC, whereby TDIC would pay Petitioner as "independent counsel" for defending TDIC's insureds in that litigation. Petitioner also had a contract with TDIC's insureds whom Petitioner represented as legal counsel of record -- this relationship also included ethical duties and

obligations which Petitioner owed to his clients including their expectations of a continuity in his representation as counsel of record.[10]

Once a contract is found, it must be determined whether the legislative act impaired the contractual relationships involved. The obligations of a contract are impaired by a law which renders them invalid, releases, or extinguishes them. *City of Torrence v. Workers' Comp. App. Bd.* 32 Cal.3d 371, 377,185 Cal.Rptr. 645, 648 (1992). In this case, Section 2860, as interpreted and retroactively applied, has relieved TDIC of the obligation to fund Petitioner as independent counsel.[11] This

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10 California Rules of Professional Conduct Rule 3-700(C).

11 In enacting Section 2860, the legislature did not expressly state whether the statute should be applied only prospectively or whether it would be given retroactive effect for claims and policies in existence before January 1, 1988, the effective date of the statute. In the only reported decision raising the issue, the court refused to apply the statute retroactively

application of Section 2860 has impaired the contractual obligations and expectations of the insureds who faced loss of indemnification if the TDIC lawyers provided to them, by taking advantage of the conflict, tipped the cases to favor TDIC.

If impairment is found, it must be determined whether the impairing law

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because of the absence of evidence as the legislature's intent. *Center Found. v. Chicago Ins. Co.*, 227 Cal.App.3d 547, 278 Cal.Rptr. 13 (1991). This decision is consistent with existing law which suggests that a statute that changes, rather than clarifies, the law is presumed to operate prospectively, absent a clear legislative expression that retroactive application was intended. *Williams v. State Farm & Cas. Co.*, 216 Cal.App.3d 1540,1548, 265 Cal.Rptr. 644, 648 (1989). Further, because an insurance policy is governed by the statutory and decisional law in force at the time the policy is issued, that law becomes part of the contract and binds the contracting parties. *Interinsurance Exchange v. Ohio Cas. Ins. Col.*, 58 Cal.2d 142, 23 Cal.Rptr. 592 (1962); *Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.2d 142, 26,130 Cal.Rptr. 446 (1976). Although the legislature has the power to change procedural rules, it may not destroy vested rights or impair contractual obligations. *Norton v. City of Pomona* 5 Cal.2d 54, 53 P2d 952 (1935); *Department of Health Services v. Fontes*, 169 Cal.App.3d 301, 215 Cal.Rptr. 14 (1985); CEB California Liability Insurance Practice: Claims and Litigation, June 1993 Update.

exceeds the bounds of the constitutional limitations *Walsh v Board of Admin.of PERS* 4 Cal.App.4th 687, 6 Cal.Rptr.2d 118,127 (1992).

Retroactive application of Calif. Civil Code Section 2860 substantially impaired the contractual relationship between the parties involved: TDIC, Petitioner, and his clients (the insureds). Enactment of Section 2860 did not merely restrict the contracting parties to "gains [they] reasonably expected from the contract," *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704 (1983), but eviscerated independent counsel coverage completely and in effect changed the attorneys' rules of professional conduct.[12] The basis of the bargain for a liability insurance contract is that in return for the

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12 Model Code of Prof. Resp. DR 5-105

insured's promise to pay premiums, the insurer promises to provide a defense to actions against the insured and to indemnify the insured for all payments the insured is legally obligated to make for an occurrence within the policy's provisions. When there are divergent interests of the insured and the insurer brought about by the insurer's possible non-coverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y,* 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984). Indeed, the insurance company's duty to defend is independent of its duty to indemnify, *Gray v Zurich Insurance Co.*, 65 Cal.2d 263, 51 Cal.Rptr. 104 (1966), and both these duties are contractual obligations the insurance company undertakes by accepting

the insureds' premiums.

Section 2860, as applied by the Court of Appeal, First Appellate District, Division 5, wipes out a key element of the insurance company's duty to defend by attempting to unconstitutionally eliminate the insureds' right to be represented by an attorney who is not in a conflict of interest against the insured.[13] The last sentence in Section 2860(b) states: "No conflict of interest shall be deemed to exist as to allegations of punitive damages...." This statement is much too broad -- punitive damages allegations may give rise to numerous conflicts at every stage of litigation because the only basis for punitive damages is conduct so willful it is outside the coverage for accidental activities.[14]

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[13] This right was established by *Cumis* and thereafter incorporated into all insurance contracts. *See Supra* nt. 10

[14] Here, demurrer-tested complaints charged

The legislature cannot amend the rules of professional conduct relating to conflicts of interest. *Brotsky v. State Bar*, 57 Cal.2d 287,19 Cal.Rptr. 153, 368 P.2d 697 (1962); *Ramirez v. State Bar*, 28 Cal.3d 402,169 Cal.Rptr. 206, 281 P.2d 1020 (1980). Strict definitions have no place in ethical determinations. One must look at the facts, circumstances, and procedural background of the particular case to determine whether a conflict of interest exists. Ethical problems such as conflicts of interest are rarely black or white. Instead, they require a delicate balancing of all the risks and possible harms, a job well suited to the judiciary. To the extent that the statute, as

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Petitioner's clients (insureds) with employing unlicensed helpers to render dental care, a dentist doing surgery on a patient's hip, and a dentist running a "meat factory" of high speed dentistry recommended by an efficiency expert who demonstrated that it was cost-effective to fix the inevitable botched work at a later time than take the time to perform the work correctly in the first place.

applied, seeks to eliminate by legislative fiat the only remedy to forcing an insured to be represented by conflicted attorneys, the statute must be void. The judiciary through its inherent power to control its proceedings and officers of the court has control over the rules for attorney conduct and ethics. Although the State Legislature and the State Bar have roles in the determination of appropriate professional conduct of attorneys, the ultimate arbiter is the judiciary.[15] Thus, to the extent that the Legislature

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15 State Bar Act, California Business & Professions Code Sections 6000-6228.

Admission to practice law is conceded to be the exercise of a judicial function. It is one of the inherent powers of the court. *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929). Although the court has recognized the Legislature's right to impose certain restrictions upon the practice of law, *Cohen v. Wright*, 22 Cal. 293 (1863), the disciplining of attorneys has been left to the judiciary, *Brotsky v. State Bar*, 57 Cal.2d 287,19 Cal.Rptr. 153, 368 P.2d 697 (1962), and the judiciary retains the power to regulate the conduct of members of the bar. *Ramirez v. State Bar*, 28 Cal.3d 402,169 Cal.Rptr. 206, 281 P.2d 1020 (1980).

is attempting to prevent the courts from determining what constitutes a conflict of interest, the Legislature is materially interfering with the court's power to control the proceedings before it. To that extent, Section 2860(b) is unconstitutional because it usurps the power of the judiciary and violates the separation of powers delineated in the Constitution of the State of California, Article VI, Section 1.[16] As a result, retroactive application of Calif. Civil Code Section 2860 substantially impaired the contractual relationship between the parties involved and must be justified by a significant and legitimate public purpose.

The substantial impairment caused by

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16 Constitution of California, Article VI, Section 1: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All courts are courts of record."

retroactive application of Calif. Civil Code Section 2860 is not justified by a "significant and legitimate public purpose ... such as the remedying of a broad and general social or economic problem." *Energy Reserves Group* at 411-12, 704-05. "[T]he severity of the impairment measures the height of the hurdle the state legislation must clear .... Severe impairment ... will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co. v Spannaus,* 438 U.S. 234, 245, 98 S.Ct. 2716, 2723 (1978).

In determining the legitimacy of a public purpose, the court must assure that "the State is exercising its police power, rather than benefiting special interests." *Energy Reserves Group,* 459 U.S. at 412,103 S.Ct. at 705. However, the court will not concern itself with whether the law is

wise or not as a matter of policy. *Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 412, 54 S.Ct. 231, 243 (1983).

Purposes held to be legitimate under the Court's standard include shielding consumers from pass-through of increased utility taxes, *Exxon Corp. v.. Eagerton*, 462 U.S. 176,191,103 S.Ct. 2296, 2306, 76 L.Ed.2d 497 (1983); protecting consumers from escalating deregulated natural gas prices." *Energy Reserves Group*, 459 U.S. at 417,103 S.Ct. at 707; and protecting mortgage holders from foreclosures during the Depression, 290 U.S. 398, 54 S.Ct. 231.

Clearly, the goals of this statute are not as lofty as the consumer protection objectives involved in the above-mentioned precedents. Section 2860 was a product of the "napkin agreement" between special

interest groups.[17] Insurance groups and attorney groups, in order to resolve problems created by the *Cumis* decision, studied many alternatives to curtail defense costs,[18] and launched a massive legislative campaign through lobbying by the California Trial Lawyers Association and other insurance and tort reform groups.[19] The lobbying battle resulted in a truce with compromise legislation in the form of Senate Bill No. 241, which included the current Section 2860.

Section 2860 was not an exercise of the State's police power, but was promulgated

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17 The "napkin agreement," worked out in Frank Fat's Sacramento restaurant, is described in the *California Lawyer*, Jan/Feb 1988, pp. 24-25. (*See* Exhibit 1, Appendix D)

18 I.S.O., Commercial General Liability Insurance--Legal Defense Cost Containment (1985); Dorsch, *Insurance Defense Costs and the Legal Defense Cost Containment Program: Is the Free Ride Over?*, 53 Ins. Couns. J. 580 (1986).

19 Cox, *Accord Reached in Calif. Tort Reform*, Nat'l L.J., Sept. 28,1987, at 3, note 5; Cox, *Tort Reform Draws Fire at California Bar Meeting*, Nat'l L.J., Oct. 5,1987, at 8; Wiegand, *Battle of the Buyout*, A.B.A. J. California Edition, Sept. 1,1988 at CE-8.

solely to benefit special interests by decreasing insurance and litigation defense costs. Furthermore, the legislature has benefited these special interests through an unconstitutional means by modifying the rules of professional responsibility for attorneys relating to conflicts of interest -- an area in the exclusive control of the judiciary.[20] The substantial impairment caused by retroactive application of Calif. Civil Code Section 2860 is not justified by any substantial and legitimate public purpose.

Even assuming that a substantial and legitimate public purpose exists, such an enactment substantially impairing the obligation of contracts must be based "upon reasonable conditions and of a character appropriate to the public

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20 *See supra* note 15.

purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22, 97 S.Ct. at 1518; *Energy Reserves Group*, 459 U.S. at 412,103 S.Ct. at 705. The statute's severe, retroactive, and permanent nullification of Petitioner's contractual and ethical obligation to represent the insureds, and the insureds' right to unconflicted representation must be measured against "the public purpose justifying [the statute's] adoption" to determine the reasonableness of the legislation. *Ross*, 655 F.Supp. at 834.

Passage of Section 2860 and its retroactive application in this case is unreasonable because it was not the result of a legitimate and constitutional exercise of the State's police power, but was promulgated solely to benefit special interests and in the process has modified the rules of professional responsibility

for attorneys relating to conflicts of interest -- an area in the exclusive control of the judiciary.[21] Adoption of Section 2860 was never intended to directly benefit the public. In addition, its meddling with attorney-client conflict of interest issues forces insurance panel attorneys to work in conflict situations and deprives the insured of an unconflicted attorney. Such a law imposes unreasonable working conditions on attorneys and cannot be reasonably applied without injuring the attorney-client relationship -- a result not in the public interest.[22]

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21 *See supra* note 15, 17-19.

22 The decision by the California Court of Appeal, First Appellate District, Division 5, in applying California Civil Code Section 2860, raises serious issues regarding the ethical bounds of the attorney-client relationship and the extent to which the legislature and other outside parties can infringe upon that relationship. The decision places an unwarranted burden on an attorney who acts in good faith to fulfill his responsibilities pursuant to *Cumis*, and runs afoul of the intent of the case as well as the requirements of the Rules of Professional

As a result, retroactive application of California Civil Code Section 2860 by the California state courts unconstitutionally altered obligations of contract in violation of the Contracts Clause of the United States Constitution Article I,

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Conduct.

In this case, the Court of Appeal, in applying the statute, placed the burden on *Cumis* counsel (Petitioner) to demonstrate direct evidence of a conflict of interest in order to justify continued representation of the insured in a conflict situation. This requirement is antithetical to the goals of the Rules of Professional Conduct, especially Rule 3-310(C) which prohibits representation when there is either an actual or potential conflict. Applying Section 2860 in such a manner puts future counsel in the anomalous position of continuing potentially conflicted representation until the point where direct evidence of a conflict exists. At this point, counsel will have already provided representation to the insured while in a conflicted position. This is exactly the situation the Rules of Professional Conduct seek to avoid.

The inherent problem with the Appeal Court's approach is that it places counsel in the position of attempting to fulfill the ethical obligation of zealously representing both the insurer and the insured while remaining alert to compile direct evidence of a conflict of interest. Since the Rules of Professional Conduct contemplate that an attorney should not undertake representation when there is a potential conflict, the Appeals Court application of § 2860 places counsel in the untenable position of ignoring ethical obligations to the public's great detriment.

Section 10 and forced insureds to accept representation by conflicted attorneys.

2. Petitioner was denied due process of the law under the Fourteenth Amendment to the United States Constitution because the lower courts refused to allow introduction of Petitioner's relevant evidence demonstrating conflicts of interest by the insurance company's "panel" attorneys, as to which the court of appeal faulted Petitioner for not introducing adequate proof that the "panel" attorneys were in conflict with the insureds they were defending. Petitioner was also forbidden to introduce evidence of work done after the statute became effective.

The Fourteenth Amendment to the United States Constitution states that no "State shall deprive any person of life, liberty, or property, without due process of law." Despite its importance, due process has never been, and perhaps can never be, precisely defined. Unlike some legal rules, due process is not a technical concept with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. *Lassiter v. Department of Soc. Serv. of Durham Cty*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 2158 (1981). Specifically, the Court has recognized that "[t]he right to present evidence is ... essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S.

411, 429, 89 S.Ct. 1843, 1853 (1969); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 56 S.Ct. 797. If relevant evidence is erroneously excluded by the trial court, and then the party is faulted by the court for not providing that evidence, there can be no fundamental fairness in the court's orders, which bound his hands.

Generally, any legally competent evidence which, when taken alone or in connection with other evidence, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one of the parties, and sheds any light upon or touches the issue in such a way as to enable the jury to draw a logical and reasonable inference with respect to the matter or a principal fact in issue, is relevant. *Williams v. Vreeland*, 250 U.S. 295, 39 S.Ct. 438;

Chesbrough v. Woodworth, 244 U.S. 72, 37 S.Ct. 579.

A. The Ad Hoc Orders

Before trial, this case came up for a summary judgment hearing. At that hearing the judge entered certain orders regarding the applicability of California Civil Code Section 2860 to this case and forbidding your Petitioner from being paid after the statute's effective date.

During trial, the trial judge interpreted the pre-trial order to mean that not only were *none* of Petitioner's services after the cut-off compensable, but he could not even use them to show the work product he did before the January 1, 1988 cut-off, nor could he prove how work before the cut-off on related "retreatment" cases and the defenses in the dental malpractice cases advanced.[23]

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23 *See* C.T. 859 where Bradley and Curley ask about Hobson v W and express an interest in

Also, he forbade Petitioner's testimony about the problems in the dental malpractice cases and what he did in these cases to deal with the problems.

The trial court focused on the number of hours, and directed that Petitioner testify along an accounting line without permitting discussion of the problems in the dental malpractice cases. The trial court's idea is entirely time focused. *See* R.T. 866, lines 1 to 23:

> THE COURT: I will suggest, Mr. Caspari, to develop a line of questioning. I will leave it up to you.
> Start the question, "Mr. Berg, how many hours do you estimate you put in on the S case?"
> "I estimate I put in 100 hours, 200," whatever number
> "What do you think you spent that

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entering the re-treatment cases. Note the copy of this letter to TDIC. *And see* C.T. 785 to 788 where Bradley and Curley sent Berg a list of questions to ask during the Hobson v W depositions of Dr. Hobson to obtain his evaluation of all the dental malpractice cases out of the presence of lawyers for the malpractice plaintiffs. Dr. Hobson was set to be the expert of those plaintiffs against Dr. W. in the malpractice cases.

> time on?"
> "Well, ten hours on settlement, ten hours interviews, 15 hours research." Best he can do.
> *We are looking for hours. We are looking for time.* It doesn't help the jury for Mr. Berg to say, "Well, I had a lot of concerns about this case and I had to sympathize with Dr. S." Doesn't help. (Emphasis added.)
>
> THE COURT: Pose your question to Mr. Berg, "I know you are an intelligent person. *I know it is difficult because you say you didn't keep time records, good time records, but you have got to give estimates.*"
>
> *"I spent so many hours, I spent so many days,* I spent so many nights. *My best estimate is this is the time* I put in on this case." (Emphasis added.)
>
> THE COURT: That is *the only way* we can do it. (Emphasis added.)

This approach by the court prevented the Petitioner from demonstrating that he had been effective and productive -- that his work was significant or even, by implication, that he had done any work at all.[24] Despite objections which generally

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[24] TDIC's expert, Mr. Cooper, contested that Berg had not done any work (*See* R.T. 1374, line

were sustained Petitioner was able to introduce into evidence two examples of his work before the Section 2860, January 1, 1988 cut-off:

1. Controlling an Expert Against Dr. W

The expert witness against Dr. W was the man who bought Dr. W's practice, David Hobson, D.D.S. Hobson had sued Dr. W in a contract action seeking to be paid for redoing most of Dr. W's cases. Petitioner tried to explain how he used Hobson v W to build a defense in the dental malpractice cases. The court cut that subject off (R.T. 807, line 19 to 808, line 16).

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23), and TDIC's lawyer argued along that line in his jury speeches that the jurors use this case to send a message to lawyers. (*See* RT 1380-1382)

2. Obtaining an Expert for Dr. W

Petitioner began to testify about W. Gene Roberts, D.D.S., the Director of Bone Development at the University of the Pacific Dental School. Dr. Roberts became familiar with Dr. Hobson's criticisms of Dr. W in conjunction with the Hobson v W contract case. In the course of that case, Petitioner learned that that Dr. Roberts disagreed strongly with Dr. Hobson's evaluations of orthodonture cases in general[25] and Hobson's retreatment plans for Dr. W's cases in particular. Through the Hobson v W case, Petitioner was able to cultivate Dr. Roberts to become an expert to defend all the dental

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25 Dr. Roberts criticized indiscriminate use of the Tweed ideal. (C.T. 826) Hobson's retreatment proposals for Hispanic (rounded face) patients was to extract all four first bicuspids and retract the incisors and canines to flatten their profiles -- an activity which would require more orthodontic movement of the teeth than cultural aesthetics requires. Root resorbtion is a hazard of such movement. The anterior teeth lose some of their anchor in the jawbone and are in danger of being loosened or lost.

malpractice cases against Dr. W.

When the natural opportunity to show what Petitioner did to find and develop Dr. Roberts as an expert to defend Dr. W. in the dental malpractice cases, this colloquy ensued at R.T. 949, line 21 to R.T. 950, line 8 with the court intervening although Respondent's attorney had not objected:

> Q. Mr. Berg, why is that significant?
>
> A. What we are looking for is a theory of defense and W. Gene Roberts is the, I think, director at the University of Pacific Dental School, Director of Bone Development is what they call it. And what I am trying to do is see about an expert who will deal with the things that Hobson had been doing serially through all the cases that resulted in a concept that accused Dr. W. of malpractice for not having done. And Roberts turned out to be a fantastic witness on that theory because he just -- he had terrible criticisms of Hobson and what Hobson was doing. In fact, he accused Hobson --
>
> THE COURT: Let's not retry the

> underlying case. *Let's tell how much time you put in.* (Emphasis added.)

Many other examples of Petitioner's industry and acumen were kept out of evidence. In a discussion of patient x-rays Petitioner studied in preparing the malpractice cases the court interrupted *in the absence of an objection. See* R.T. 961, line 22-R.T. 962, line 3:

> BERG (testifying): Now, with orthodontia the roots of the tooth are very important. Every time you move teeth you may cause resorption of root, and you can see that in periapical x-rays.
>
> THE COURT: You are off into another area, Mr. Berg.
>
> THE WITNESS: I am trying to tell you the kinds of material I am looking at.
>
> THE COURT: You did the work, you did this thing. *We don't need the details.* I am sure it is interesting. (Emphasis added.)

Respondent's counsel did object, and Petitioner was again prevented from providing a full answer to a direct

examination question about the purpose for certain other work at R.T. 964, ln 24 to R.T. 965, ln 2:

> Q. It was some deposition you were reviewing with the purpose in mind of getting information for the Wieber case?
>
> A. Exactly. As I saw the cases together, I could see they were interdigitating and there was a way to, I thought, develop defense of the -
>
> MR. ROREM: Your Honor, objection. No question pending.
>
> THE COURT: You have answered the question. Next question.

At times the court became so focused on its hours/accountancy approach that it would not even let Petitioner answer questions about what he did to support particular entries on his bills:

> Q. Next item on the bill is $200,000 demand. Do you remember what that is about?
>
> A. That was a demand in the case. Most of these cases had gigantic demands. The total of the demands exceeded the policy or policies that could be covered.

> And then on top of that, there were re-treatment claims that further depleted --

MR. ROREM: Objection, irrelevant.

THE COURT: Objection, sustained.

Asked what he did at the early stage of Dr. P's litigation Petitioner was not permitted to answer. *See* R.T. 1007, lines 11 to 22:

> BY MR. CASPARI:
> Q. Mr. Berg, could you tell us what you did at the early stages -- what you did at the early stages of the P. litigation.
>
> A. In the early stages of the case, we had all of the work in the hands of one attorney, except for two cases. One was with Ed Zinman, who I know and talked with, trying to find out, you know, what his objectives were, where the thing was going, who might try the case.
> And the other was with Kalzamanski [Cal Zamanski, Esq] and Bradley & Curley wasn't getting along with [him].
>
> MR. ROREM: Objection, nonresponsive.
>
> THE COURT: Sustained. Also a narrative.

Rulings such as these left the jury with the impression that the instant case was only about counting hours and not about Petitioner's productivity based on his study of the case materials, his individual industry, and his useful activity.

In the course of his work as "independent counsel" Petitioner found specific documentation which would be useful to undercut his clients' adversaries. Petitioner intended to offer these facts into evidence at the trial to show his work. The court interjected (with no objection by plaintiff's attorney) and both diminished the impact of the evidence and drew the line against any more such evidence. *See* R.T. 1010, line 19 to 1011, line 23:

> Q. Could you describe for us generally what that approach was that you were looking at.

A. There were several threads that began to become apparent that could be defense methodologies.
One of the things that I was interested in was whether Dr. Hobson was the incorruptible pure soul he was relating himself to be as an expert witness, and one of the things that I found -- remember Mr. Cooper said you never look at insurance forms. Well, I look at everything.
We got the subsequent records of Dr. Hobson, including his insurance forms, and he -- not all of them were interesting, but there were two that I found that are very fascinating.

Q. What was fascinating about those forms, Mr. Berg?

A. First of all, it was double billing.

And second of all, if you take a look at them, they are identical bills to two different insurance companies by Dr. Hobson under two different policies.
If you put it up on the board, I will show you what I am talking about.

MR. CASPARI: We would like to have marked as Petitioner's next in order --

THE CLERK: Marked as Petitioner's Exhibit Q for identification.

THE COURT: *I will let you do it this one time.* Don't do it twice.

> We are not going to go into all the details of the underlying cases. (Emphasis added.)

Once the trial court had clearly made it impossible for Petitioner to show the nature or the value of the work which he performed, the jury's response to TDIC's argument was a foregone conclusion. TDIC's lawyer told the jury, "Petitioner did not show what he did." (*See* R.T. 1321, 1345, 1374, 1440, 1447 and 1449).

The role of Dr. Tanner's defense attorney in malpractice cases where Dr. P and Dr. Tanner were both charged came up at R.T. 1027, and again the court cut off Petitioner's description of his work (lines 5 to 14):

> Q. Who is Art Pearson?
>
> A. Art Pearson is another defense lawyer and we had a cross-complaint against Terry Tanner because Terry had been spoiling records and blaming [Dr. P.] for spoiling the records. Terry had been treating the patient and doing --

THE COURT: *Let's not try the case.* You called Defense Counsel? (Emphasis added.)

With regard to Dr. M the same pattern was followed. *See* R.T. 1035, lines 6 to 11:

A. Oliva didn't have the real bad problem Carlile had.

Q. You said it was a serious problem in Carlile. What was the serious problem?

MR. ROREM: Objection, irrelevant.

THE COURT: Objection, sustained.[26]

B. Plaintiff's Theory of the Case Allowed Petitioner's Evidence

Plaintiff's claims manager, Gabor Nyary, testified that *if Petitioner did the work he was entitled to be paid.* (*See* R.T. p. 275, lines 3 & 4)

Q. Mr. Berg would be entitled to be paid for that if he did that; is that

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[26] The Carlile problem was that Dr. M, a dentist, violated the Medical Practice Act by doing surgery on plaintiff's hip without a medical license. No insurance will cover acts in violation of law.

right?

A. If he did that.

The exact date of performance of work didn't matter if it was the date the papers were received or some other date. Mr Nyary further testified on page 275 at line 20 to 26:

> Q. My question is, if Mr. Berg puts on his time sheet -- I am sorry -- on his bill, "Pleading received, .03 hours, September 3rd" does it make any difference to TDIC if he does that work on September 3rd or September 7th. They are going to have to pay him the same amount, aren't they?
>
> A. The work is done, he is entitled to payment.[27]

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27 Mr. Nyary testified that if TDIC had questions about what the attorneys were doing plaintiff's procedure was to phone the attorney (R.T. 169, line 12 to 21). Mr. Nyary never discussed defendant's fees or his work with him (R.T. 249, line 24 to 250, line 3, 345 lines 4 to 15, R.T. 354, lines 1 to 7, R.T. 361, lines 15 to 16). Plaintiffs never sent Mr. Berg their billing guidelines, if they had any. (R.T. 362, line 18 to 363, line 9). The only contact plaintiff had with defendant about bills related to format. Mr. Walker talked to "some lady" in defendant's office (R.T. 1066, line 18) and asked to have the format of defendant's bills changed, which was done (R.T. 1065, line 7 to 1068, line 21).

At page 276 Mr. Nyary continued at lines 1-4:

> Q. So if he, in fact, did the work, he is entitled to be paid for it?
>
> A. If he did the work, he is entitled to payment.

C. The Trial Judge Forbade Admissible Evidence to Dispel the Fraud Charge

Petitioner's work with TDIC's panel counsel after the Section 2860, January 1, 1988 cut-off was squelched. (*See* R.T. 480, line 20 to R.T. 481, line 5.) The fact that Petitioner continued to work after the cut off was held to be irrelevant *even as to his state of mind* for intent to defraud. The subject came up in testimony of TDIC's Dorn Walker:

> BY MR. CASPARI:
> Q. Now, Mr. Walker, after Mr. Berg was advised in the W and P cases that he was no longer going to be paid by TDIC, are you aware that Mr. Berg continued to work on those cases?

MR. ROREM: Objection, irrelevant.

THE COURT: Mr. Caspari, what is the relevance if he knows that he was still working after the cutoff date?

MR. CASPARI: The relevance, Your Honor, is that -- actually it had to go to Mr. Berg's state of mind. If we could approach the bench. I do not think you want me to argue this.

THE COURT: No, I don't.
Objection, sustained.
(C.T. 1175, line 21 to 1176, line 5)

The court sealed that ruling with an erroneous jury instruction which absolutely cut off Petitioner's compensation after January 1, 1988 (C.T. 628 and 629, R.T. 1461, lines 13 to 16).

Petitioner was forbidden to introduce evidence of work done before the cut-off that came out in papers generated by him that are dated after January, 1988, and he was restricted in his efforts to discuss the work he had done prior to the cut-off. Those rulings supported Respondent's theory of the case as developed by

Respondent's expert, Brand Cooper, Esq. that Petitioner did *no work* therefore he should not have been paid. (*See* C.T. 727, lines 20 to 24.)

In the course of defending against these charges obviously Petitioner needed to provide the jury a basis to believe that his billing was honest, reasonable, not excessive, and related to productive work actually performed for the benefit of the cases. That defense was available through Petitioner's testimony about how his work differed from the work of the insurance panel counsel, what problems were encountered, how they were solved, and the relationship of his work to results actually obtained in the cases. Respondent put into issue all these questions and opened the door to Petitioner's exposition of the histories and progress of the cases.

The contract action of Hobson v W was primarily a massive dental malpractice suit by Hobson to make money doing retreatment of almost all of Dr. W's patients whose dental insurance money Dr. W had received before he sold the practice to Dr. Hobson.

The trial court allowed Respondent to disparage (through its expert Mr. Cooper) the allocations of time on that case which Petitioner testified he had attributed properly to the dental malpractice defenses. Mr. Cooper was critical of that characterization by Petitioner (R.T. 574, lines 5 to 13). It amounted to $27,062 (R.T. 585, line 25) which TDIC paid.

Cooper's testimony put into issue the very question on which Respondent had sought and obtained a pre-trial *in limine* order forbidding Petitioner from discussing the Hobson v W suit (motion *in*

limine, no. 1, C.T. 593-594). Respondent could hit Petitioner on this point, and did. Petitioner was forbidden to defend himself by providing a complete description with illustrations showing exactly how Hobson v W was properly used to defend the dental malpractice cases. Only specks of information were allowed into evidence such as the reference to Dr. Roberts (*See* pages 11 and 12 hereof) and the Tracy Richardson double billing (*see* page 16 hereof quoting the trial judge, "I'll let you do it this one time. Don't do it twice.") Petitioner was not allowed to show that Dr. Roberts accused Hobson of injuring two of the dental malpractice plaintiffs (C.T. 825) or that he could be helpful in the other cases (C.T. 826 to 827). Among other things Petitioner was forbidden to show that Hobson testified in a deposition Petitioner took that he would

personally benefit from stirring up dental malpractice suits against Dr. W (C.T. 698, line 31). Obviously those evidentiary rulings left Petitioner a sitting duck for Respondent's attacks.

D. Respondent Capitalized on the Court's Erroneous Evidence Rulings

Respondent's counsel made hay with those evidence restricting rulings to cast doubt that any work had been done by Petitioner before the cut-off. *See* his argument beginning at R.T. page 1321, lines 20 to 22:

> We got some very interesting bills up here and the interesting thing is Mr. Berg has shown us nothing, nothing to support those bills.

R.T. 1345 lines 4-7:

> ...where is he giving them the fruit of these hours, of pondering all of this? He showed almost nothing. He had absolutely nothing to show for the work that he did in P.

R.T. 1345 line 23 & 24:

> He didn't bring in his documents.

R.T. 1374 line 23:

> *There is no reason to believe that he did any work....*
> (Emphasis added.)

R.T. 1440 line 24 to 27:

> He was reading this deposition and this deposition and this, comparing it with that. The problem is, we don't know that he did that. What did he leave us?

R.T. 1447 line 13-22:

> I am pointing to the fact that the documents didn't come in here. The substantiating, corroborating proof. He said, "Well, Mr. Cooper said that he looked at the work product." That is right. Mr. Cooper looked at the work product and was dismayed and came to the conclusion he hadn't done anything. He looked at what they tried to find in the way of work product and found that he wasn't doing to anything, wasn't writing anything, wasn't doing anything.

And R.T. 1449 lines 1-7:

> Another problem that Mr. Cooper found that the work product. They said he looked at the work product. There was another problem. He couldn't connect it up. Whatever papers are there he couldn't connect up with work that Mr. Berg had done. There was no indication of work. There were papers, but on most of it, the so-called work product, was almost

non-existent.

This inflammatory argument was based on the court's refusal to allow Petitioner to discuss his work, show how it was useful, and produce into evidence documents dated after the cut-off which were based on work done by him before the effective date of §2860. An adverse verdict of fraud was inevitable because those rulings allowed Respondent's attorney to make false statements which he knew Petitioner couldn't impeach.[28] The argument ended with a pitch to the jury to make an example of Petitioner.

During closing argument *at the liability phase* of the instant trial, Respondent's counsel attempted, and apparently succeeded, in inflaming the jury to the point that a fair trial was

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28 A lengthy description of defendant's work is found at C.T. 689 to 711 which is supported by documents at Clerk's Transcript pages 716 to 1157.

not possible. Counsel urged the jury make an example of appellant because "There is no reason to believe that he did any work...." Counsel urged the jury to send a message to Petitioner to take to his fellow lawyers (R.T. 1382, line 7 to 13). He argued that the message should be a huge verdict, "[The] prime reason is Mr. Berg has been licensed . . . to be an attorney." (R.T. 1380, line 15 to 18) Even though the question at that stage was whether appellant had defrauded TDIC, and if so by what amount, counsel argued that appellant should be punished and made to give back every cent TDIC had paid him. (R.T. 1380, line 15) The argument was not for compensation, but to punish his alleged misconduct; "The administration of our legal system is what he has trashed." (R.T. 1381, lines 4 to 5) The jury, apparently swayed by counsel's rhetoric,

complied with his suggestion and returned a verdict against Petitioner. In the face of counsel's argument, "This was a dirty deal from the beginning," (R.T. 1382, lines 16 to 17) it was impossible for appellant to get a fair trial.

E. Admissible Evidence of Work to Support an Attorney's Bill

The reasonableness of a lawyer's fee is determined by evidence of many factors, including:

> "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age and his experience in the particular type of work demanded [citation]; *the intricacies and importance of the litigation*, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. (emphasis added.)
>
> *In re Marriage of Cueva* (1978) 86 Cal.App. 3d 290, 296 [149 Cal.Rptr. 918]

In Cueva a divorce lawyer's fee was at issue on an appeal where "abuse of discretion" is the standard of review. The Court of Appeal evaluated the problems customary to settling community property disputes (at page 297). At page 299 the court discussed fees awarded by a divorce court judge based on the attorney; work as determined "from [the court's] own experience and from the facts and circumstances of the case...." relying on *Anthony v Anthony* (1968) 259 Cal.App. 2d 156, 66 Cal.Rptr. 420 continued:

> [P]laintiff hired attorney whose experience in accounting, corporate finance and community property law facilitated a thorough investigation of Anthony Pools, Inc. and Defendant's assets. Faced with the result of plaintiff's attorneys' investigation, but fearing management problems and financial disaster if Anthony Pools, Inc. stock was suddenly dumped on the market, Defendant refused to transfer any stock to plaintiff. Defendant's attorneys came up with the solution Defendant accepted: The property settlement agreement incorporated a

> trust composed of Anthony Pools stock; plaintiff got trust income and the power to invade corpus up to $30,000 annually. In substance, through skillful investigation and success in settlement negotiations, plaintiff's attorneys obtained for plaintiff, in addition to Defendant's offered $415,000 in property and $1,000 monthly, trust income worth $450,000, $500 monthly in child support and Defendant's promises to pay income taxes and to pay plaintiff's attorneys' fees known to be substantial. In the light of plaintiff's attorneys' efforts and success we cannot say the trial court abused its discretion.

In *Stokus v Marsh* (1990) 217 Cal.App. 3d 647, 658, 266 Cal.Rptr. 90, 96, the trial court made this assessment which the Court of Appeals quoted:

> Plaintiff's counsel were met at every step with learned, energetic, imaginative, concentrated, and extensive opposition by extremely able counsel who specialize in housing matters. Petitioners appear to be able to put up the stoutest resistance, which they did.

From the foregoing it is clear that the attorney has the right to evidence which describes his work, discusses the problems, demonstrates his quest for

solutions, evaluates the opposition counsel and witnesses, and in every other way provides adjective materials upon which a jury can make an intelligent assessment of his knowledge, grasp of the case, ingenious solutions, and other exercises of diligence, skill and acumen to illustrate the fact that he did the work for which he was engaged.

The trial court's limitation on such evidence and its insistence on hours only is clearly erroneous and devastatingly unfair contrary to the fundamental fairness required by the due process clause of the 14th Amendment and resulting in an obvious miscarriage of justice.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue for the above stated reasons.

Because this Petition deals with the Constitutional application of California Civil Code § 2860, 28 U.S.C. § 2403(b) may be applicable; therefore, the Attorney General of the State of California shall also be served with this Petition.

Respectfully Submitted,

2/16/94

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